IN THE

Supreme Court of the United States

No. .....

OCTOBER TERM, 1976

76-1655

ROBERT RICKENBACKER,

Petitioner,

-against-

THE WARDEN, AUBURN CORRECTIONAL FACILITY AND THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALBERT J. KRIEGER
AARON J. JAFFE
Attorneys for Petitioner
401 Broadway
New York, New York
(212) 966-6790

Of Counsel:
AARON J. JAFFE
FREDERIC GROSS

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

TABLE OF CONTENTS

Page

Petition for a Writ of Certiorari 1

Opinions Below 2

Jurisdiction 2

Question Presented for Review 2

Constitutional Provision Involved 2

Statement of the Case 3

Reason for Granting the Writ 5

Conflicts in the Circuits 5

Courts which Have Abandoned the "Farce, Sham, Mockery" Test 8

A Circuit in Transition 13

Circuits which Continue to Apply the "Farce, Sham, Mockery" Test 14

Commentators 15

The State Courts in the Second Circuit 16

Conclusion 25

Appendices

Appendix A—Opinion of the United States Court of Appeals for the Second Circuit 1a

Appendix B—Opinion of the United States District Court Judge for the Eastern District of New York .. 15a

Appendix C—Order of the United States Court of Appeals for the Second Circuit Denying Re-Argument En Banc 28a

Cases Cited:

Federal Cases

Argersinger v. Hamlin, 407 U.S. 25 (1972) 6

Avery v. Alabama, 308 U.S. 444 (1940) 6

Beasley v. United States, 491 F.2d 687 (6th Cir. 1974) . 11

Black v. United States, 269 F.2d 38 (9th Cir. 1958) 15

Bottiglia v. United States, 431 F.2d 930 (1st Cir. 1970) . 13

Brown v. Mississippi, 297 U.S. 278 (1936) 7

Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962) 15

Bruce v. United States, 379 F.2d 113 (D.C. Cir. 1967) . 8

Cardarella v. United States, 375 F.2d 222, 230 (9th Cir. 1967) 12

Coles v. Payton, 389 F.2d 244 (4th Cir. 1968) 10

Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), cert. denied 325 U.S. 889 (1945) 6

Dunker v. Vinzant, 505 F.2d 503 (1st Cir. 1974) 14

Faretta v. California, 422 U.S. 806, 834 (1975) 24

Frand v. United States, 301 F.2d 102 (10th Cir. 1962) .. 15

Garten v. Sivenson, 497 F.2d 1137 (8th Cir. 1974) 12

Gideon v. Wainwright, 372 U.S. 335 (1963) 6

Griffin v. Illinois, 351 U.S.12 (1956) 23

Hardy v. United States, 375 U.S. 278 (1964) 21

Johnson v. Johnson, 18 Cr. L. Rep. 2559 (3rd Cir. 1976) 10

Johnson v. United States, 506 F.2d 640 (8th Cir.), cert. denied 95 S. Ct. 1404 (1974) 12

Johnson v. Zerbst, 304 U.S. 458 (1938) 7

Jones v. Huff, 152 F.2d 14 (D.C. Cir. 1945) 7

Karger v. United States, 388 F. Supp. 595 (D. Mass. 1975) 14

Latimer v. Cranor, 214 F.2d 926 (9th Cir. 1954) 15

McKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960) ... 11

McMann v. Richardson, 397 U.S. 759, 771 (1970) 2

McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974) 12

Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), cert. denied 358 U.S. 850 (1958) 15

Mooney v. Holohan, 294 U.S. 103 (1935) 7

Moore v. Dempsey, 261 U.S. 86 (1923) 7

Moore v. United States, 432 F.2d 730 (3rd Cir. 1970) (en banc) 10

Moran v. Hogan, 494 F.2d 1220 (1st Cir. 1974) 13

O'Malley v. United States, 285 F.2d 733 (6th Cir. 1961) 11

Powell v. Alabama, 287 U.S. 45 (1932) 6

Ross v. Moffit, 417 U.S. 600 (1974) 23

Scott v. United States, 427 F.2d 609 (D.C. Cir. 1970) .. 9

Snead v. Smyth, 273 F.2d 838 (4th Cir. 1959) 10

United States v. Blunk, 17 USCMA 158, 37 CMR 422 (1967) 13

United States v. Currier, 405 F.2d 1039 (2nd Cir.), cert. denied 395 U.S. 914 (1969) 14

United States v. De Coster, 487 F.2d 1197 (D.C. Cir. 1973) 9

United States v. DeCoster [II] ——F.2d——, 20 Cr. L. Rep. 2080 (D.C. Cir. 1976) 22

United States v. Durant, ——F.2d——, Slip Op. 635 (No. 76-1198, 2nd Cir. 1976) 23

United States v. Evans, 18 USCMA 3, 39 CMR 3 (1968) 13

United States v. Fessel, 531 F.2d 1275, 1278 (5th Cir. 1976) 22

United States v. Hines, 470 F.2d 225 (3rd Cir.), cert. denied 410 U.S. 968 (1972) 10

United States v. Hunter, 2 USCMA 601 26 CMR 381 (1958) 12

United States v. Sanchez, 483 F.2d 1052 (2nd Cir. 1973) 14

United States v. Stern, 519 F.2d 521 (9th Cir. 1975) ... 15

United States v. Taylor, et al. Slip Op. No. 76-1210, 1256 1264-66, 1288, pp. 2829-30 (2nd Cir., April 13, 1977) 21

United States v. Wight, 179 F.2d 376 (2nd Cir.), cert. denied 338 U.S. 950 (1950) 14

United States v. Yanishevsky, 500 F.2d 1327 (2nd Cir. 1974) 14

United States ex rel. Darcy v. Handy, 203 F.2d 407, 417 (3rd Cir. 1953) (en banc) 9

United States ex rel Maselli v. Reincke, 383 F.2d 129 (1967) 25

United States ex rel Feeley v. Ragan, 166 F.2d 976, 981 (7th Cir. 1948) 11

United States ex rel. Reis v. Wainwright, 525 F.2d 1269 (5th Cir. 1976) 22

United States ex rel. Walker v. Henderson, 492 F.2d 1131 (2nd Cir. 1974) 14

United States ex rel. Williams v. Twomey, 510 F.2d 634, 640-41 (7th Cir. 1975) 12

West v. Louisiana, 478 F.2d 1026, 1033 (5th Cir. 1973) 11

Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965) 11

STATE CASES

In Re Bousley, 130 Vt. 296, 299, 292 A.2d 249, 252 .. 17

In re Cronin, —— Vt. ——, 336 A. 2d 164, 168 (1975) . 17

People v. Bennett, 29 N.Y.2d 462, 466-67, 329 N.Y.S. 2d 801, 804 (1972) 16

People v. Labree, 34 N.Y.2d 257, 260-61, 357 N.Y.S.2d 412, 414-15 (1974) 16

State v. Clark, 19 Cr. L. Rep. 2558 (1976) 16

FICTION

L. Carroll, Through the Looking Glass, Ch. 6 (1871) .. 24

COMMENTATORS

Bazelon, Defective Assistance of Counsel, 42 U. of Cinn. L.R. 1, 28 (1973) 16

Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to our System of Justice? 42 Ford. L.R. 227, 234 (1973) 18

Bines, Remedying Ineffective Representation in Criminal Cases: Departures From Habeas Corpus, 59 Va. L.R. 927 (1973) 16

Finer, Ineffective Assistance of Counsel, 58 Corn. L.R. 1077 (1973) 16

Kaufman, Address at County Lawyers Dinner, N.Y.L.J. Dec. 7, 1973 p. 1 18

Note, Effective Assistance of Counsel for the Indigent Defendant, 78 Harv. L.R. 1434 (1965) 16

Stone, Ineffective Assistance of Counsel and Post Conviction Relief in Criminal Cases: Changing Standard and Practical Consequences, 7 Col. Human Rights L. Rev. 427 (1975) 24

Waltz, Inadequacy of Trial Defense Representation as a Ground for Post Conviction Relief in Criminal Cases, 59 N.W.U.L.R. 289 (1964) 16

IN THE

Supreme Court of the United States

OCTOBER TERM 1976
No.

ROBERT RICKENBACKER,

Petitioner,

-against-

THE WARDEN, AUBURN CORRECTIONAL FACILITY AND THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Second Circuit.

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Your petitioner, Robert Rickenbacker, prays that a writ of certiorari issue to the United State Court of Appeals for the Second Circuit to review its judgment entered on the 22nd day of December, 1976, rehearing en banc denied on the fifth day of April, 1977, affirming the dismissal and denial of a Writ of Habeas Corpus in the United States District Court for the Eastern District of New York.

OPINIONS BELOW

The judgment of the Court of Appeals was accompanied by an opinion, not as yet officially recorded, (——F2d.——, 1976) a copy of which is annexed hereto as Appendix A

The judgment of the District Court was accompanied by an opinion, a copy of which is annexed hereto as Appendix B.

JURISDICTION

The Decision of the Court of Appeals was entered on December 22, 1976 and the petition for a hearing en banc was denied on April 5, 1977. A copy of the order denying the hearing en banc is annexed hereto as Appendix C.

This petition has been timely filed.

The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

Should the Court in light of *McMann v. Richardson*, 397 U.S. 759 (1970) and *Parker v. North Carolina*, 397 U.S. 790 (1970) define the lower limits of competency of counsel within the meaning of the Sixth Amendment and compel the several circuits to adopt a uniform standard regarding a lawyer's performance—a standard that is presently non-existent, resulting in inevitable conflict in the circuits.

CONSTITUTIONAL PROVISION INVOLVED

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been

committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On July 30, 1975, three men entered a grocery store at Nostrand and Albermarle Avenues in Brooklyn. The owner, Sam Fichera, was serving customers. In the store were Fichera's cousin, Vito Petrancosta, and Petrancosta's son Michael. One of the three thugs, Zachary Morgan, was armed. The three attempted to rob the store. In the course of the robbery, Morgan shot and killed Vito Petrancosta. The three then ran out of the store fleeing towards a waiting car. Fichera, who was licensed to possess a weapon, pursued them, firing two shots.

Patrolmen Thomas Walsh and Donald Scannapieco were on radio motor patrol in the area at that time. Hearing Fichera's shots, they ran in that direction. They saw three men running towards a parked car. One of them, Zachary Morgan, entered the car and was apprehended by Scannapieco together with the driver, one Curtis Austin. The other two fled on foot and were pursued by Patrolman Walsh in his police car. Walsh testified that one of the two men, whom he later identified as Rickenbacker, tossed a gun between two parked cars during flight. When the two fleeing men ran in different directions Walsh pursued and caught David Ferguson. The third man escaped.

At the police station, Morgan, Ferguson and Austin, or one of them, apparently disclosed that Robert Rickenbacker was the man who had escaped.[1] Detective Robert

1. None of these three was called as a witness. All three had been convicted prior to the instant trial.

Marshall, who had been assigned the case, and after speaking to Morgan, Ferguson and Austin at the police station, sought Rickenbacker at 63 Decatur Street in Brooklyn. There he spoke to one Thomas Rickenbacker,[2] and made a room-to-room search of the house. He subsequently went to several other addresses in Brooklyn and Queens searching for Rickenbacker, but was unable to find him.

Rickenbacker was not located until March 11, 1971, nine months after the robbery when he was purportedly apprehended on unrelated charges, charges that are not specified in the record. His first trial, at which Morgan and Ferguson were co-defendants, ended in a hung jury solely as to Rickenbacker.

At his second trial, both Fichera and Michael Petrancosta testified that only one of the robbers, identified as Zachary Morgan, had a gun. Both Fichera and Petrancosta identified Morgan and David Ferguson as participants in the robbery. Neither could identify Rickenbacker. The two patrolmen, Scannapieco and Walsh, identified Rickenbacker. Scannapieco's identification was based on two glimpses, Walsh's on possibly five during the chase. Scannapieco and Walsh both testified that two of the three men they saw running towards the parked car had guns, although both Fichera and Petrancosta insisted that only Morgan was armed.

At the trial Rickenbacker was represented by assigned counsel.[3] In cross-examining the state's seven witnesses,

2. The trial judge struck the name of the person allegedly spoken to, Thomas Rickenbacker, from the record, and instructed the jury to disregard it. Shortly thereafter, Marshall testified that at another address he spoke to one James Rickenbacker. That name was also ordered stricken, and the jury again instructed to disregard it (T 78-79, 82-84). It is well-known that jurors, like all human beings, cannot totally "strike" words from their memories merely because they are instructed to do so. Neither Thomas Rickenbacker nor James Rickenbacker was called as a witness.

3. Counsel had apparently been initially retained by Rickenbacker's family. However, during the time of trial he was appearing as assigned counsel.

counsel asked a total of twenty-six questions.[4] The defense rested without presenting any case.

An appeal was taken to the Supreme Court of the State of New York, Appellate Division, Second Department and the judgment was affirmed. (No opinion). Leave to appeal was denied by the Court of Appeals of the State of New York on November 14, 1974. The petitioner is presently serving an indeterminate sentence of twenty five years to life in a New York State Correctional Facility.

REASONS FOR GRANTING THE WRIT

1. Confusion exists in the several circuits regarding the minimal standards required of counsel to meet the Sixth Amendment's demand of effective assistance. It is essential that the Supreme Court of the United States define the lower and acceptable limits below which assistance becomes ineffective. Such a ruling would eliminate conflict and eradicate the confusion.

CONFLICT IN THE CIRCUITS

The Sixth Amendment provides, in pertinent part, that "In all criminal prosecutions, the accused shall enjoy the

4. Counsel asked seven questions of Mr. Fichera. The State objected to two of these, and the objections were sustained. All seven questions related to Mr. Fichera's own gun, and to tests performed by the police on that gun.

Eight questions were asked of Patrolman Walsh. At least three were repetitious of the district attorney's questions (i.e., Q. "Did I understand you to say . . . ?" A. "Yes.")

Counsel asked seven questions of Patrolman Scannapieco, five of which were repetitious of direct testimony.

Marshall was asked four questions, three of which were a repetition of direct.

No questions at all were asked of Michael Petrancosta, Patrolman Thomas Moore (who had gone to the store after the robbery, and accompanied the victim to King's County Hospital, but was not involved in the chase) or Dr. Milton Wald (the Medical Examiner).

right . . . to have the Assistance of Counsel for his defence." That right is guaranteed in state criminal trials by the Fourteenth Amendment Due Process clause. *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Argersinger v. Hamlin*, 407 U.S. 25 (1972). The Constitution is not satisfied by the pro forma appearance of counsel, *Powell v. Alabama* 287 U.S. 45 (1932). Rather it mandates that an accused receive effective assistance of counsel. *Avery v. Alabama*, 308 U.S. 444 (1940).

What is effective assistance of counsel? Against what standard is any court to measure the performance of counsel at the trial level? This Court has not yet definitively spoken on the question.[5] The circuits are in conflict.

The earliest case to establish a standard for measuring the effectiveness of counsel is *Diggs v. Welch*, 148 F.2d 667 (D.C. Cir.), cert. den. 325 U.S. 889 (1945). The Diggs court held that trial counsel would be considered effective unless his performance were so inadequate as to turn the proceedings into a sham, a farce, a mockery of justice. Five Supreme Court cases were cited for this proposition (148 F.2d at 669, fn. 2). None of them supports it. Rather, each stands for the proposition that where the proceedings *have* been turned into a farce, for whatever reason, no conviction

5. In a related context the Court has held that pre-trial advice to an accused must be "within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771 (1970). The Court noted that counsel could not and should not be expected to predict accurately future court decisions, but advised the courts "that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." *Id.* In the companion case of *Parker v. North Carolina*, 397 U.S. 790 (1970), the Court held that the advice rendered by counsel was also within the required range. It has not further defined the lower limits of "competence."

can stand.[6] None suggests the proceedings *must* be reduced to that level before relief will be granted.

The *Diggs* Court then offered what is best described as a pragmatic rationale for its holding. It noted that "(i)n many cases there is no written transcript and so (a habeas petitioner or 'jailhouse lawyer' attacking a conviction) has a clear field for the exercise of his imagination." Id. at 670. It surmised that convicts would, out of sheer boredom or monotony, submit groundless petitions for federal habeas relief based upon incompetency, thus inundating the federal courts. Today, of course, virtually all criminal proceedings are transcribed so that the pragmatic justification no longer exists.

The District of Columbia Circuit reaffirmed the "farce, sham, mockery" standard in *Jones v. Huff*, 152 F2d 14 (D.C. Cir. 1945) and subsequent cases. When the question arose in other circuits they, in the absence of other precedent, adopted the *Diggs* test without analyzing the underlying rationale. Thus a form of precedential inbreeding was instituted, with each circuit (except the Fourth Circuit) rotely asserting the "farce, sham, mockery" standard, merely citing *Diggs* and/or cases which ultimately rely on *Diggs*.

Over the years, though, most of the circuits have come to realize that the *Diggs* standard is on its face too low, that an attorney's performance may well be ineffective without falling to the level of a "farce", that the constitutional guarantee of effective assistance assures an accused something more than a travesty, that the line must be drawn somewhere above the level of the absurd.

6. The five cases cited are *Moore v. Dempsey*, 261 U.S. 86 (1923) (mob violence), *Powell v. Alabama*, *supra*, (mob violence; no counsel appointed), *Mooney v. Holohan*, 294 U.S. 103 (1935) (knowing use of perjured testimony by prosecutor; writ not issued for failure to exhaust state remedies), *Brown v. Mississippi*, 297 U.S. 278 (1936) (coerced confession), and *Johnson v. Zerbst*, 304 U.S. 458 (1938) (no counsel at trial).

We demonstrate in the argument that courts have used different words to describe what constitutes "effective" assistance of counsel. Some have broadened the definition of "farce", while continuing to pay lip service to the *Diggs* test. Others speak of broadening the definition of "effective". Some have attempted to devise "check lists" of various things an attorney must do in order to be effective within the meaning of the Sixth Amendment. Others have said the attorney's performance must meet a "minimum level", or a "customary level", or the "prevailing level" of competency.[7] Whatever words are chosen, the fact remains that the courts are demanding a higher level of performance than that imposed by *Diggs* and its progeny.

Only three circuits continue to apply the "farce, sham, mockery" standard without modification. Each initially adopted it without analysis, merely stating it and citing cases. None has ever attempted to vindicate or support it independently. The reason is obvious. ***The application of the uncompromising "farce, sham, mockery" test can no longer be justified. Every circuit which has subjected that standard to examination has modified it.***

COURTS WHICH HAVE ABANDONED THE "FARCE, SHAM, MOCKERY" TEST

The District of Columbia Circuit.

The circuit which gave birth to the "farce, sham, mockery" standard abandoned it *sub silentio* in *Bruce v. United States*, 379 F.2d 113 (D.C. Cir. 1967), where it held:

> "In earlier cases it was said that a claim based on counsel's incompetence cannot prevail unless the

7. The term "minimum level" would appear to be ill-chosen. An analysis of the cases using the phrase indicates that those courts actually demand a performance which meets a prevailing or customary level of competency.

> trial has been rendered a mockery and a farce. These words are not to be taken literally, but rather as a vivid description of the principle that the accused has a heavy burden in showing requisite unfairness." *Id.* at 116.

The circuit has since reaffirmed *Bruce*, in *Scott v. United States*, 427 F.2d 609 (D.C. Cir. 1970), where it remarked:

> "The 'farce and mockery' standard derives from some older doctrine of the content of the due process clause of the Fifth Amendment. What is involved here is the Sixth Amendment. The Sixth Amendment has overlapping but more stringent standards than the Fifth Amendment as is clear from other contexts. Compare, for example, United States v. Wade, 388 U.S. 218 (1967) with Stovall v. Denno, 388 U.S. 293 (1967). The appropriate standard for ineffective counsel, set forth in *Bruce, supra*, is whether gross incompetence blotted out the essence of a substantial defense." *Id.* at 610.

In *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973), the court held:

> "A defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent, conscientious advocate." *Id.* at 1202 (Emphasis in original)

The Third Circuit.

The Third Circuit adopted the *Diggs* test in *United States ex rel. Darcy v. Handy*, 203 F.2d 407, 417 (3rd Cir. 1953) (en banc), citing cases which rely, ultimately, on *Diggs*. That standard was abandoned in 1970 when the court held, again en banc:

> "The standard of adequacy of legal services as in other professions is the exercise of the customary

> skill and knowledge which normally prevails at the time and place." *Moore v. United States*, 432 F.2d 730, 736 (3rd Cir. 1970) (en banc) (footnote omitted)

The court noted the differing terms used by various circuits to describe the standard against which counsel's performance is to be measured, and relied on *McMann v. Richardson, supra,* to support its own formulation. The circuit has since reaffirmed *Moore* in *United States v. Hines*, 470 F.2d 225 (3rd Cir.) cert. den. 410 U.S. 968 (1972), and *Johnson v. Johnson*, 18 Cr. L. Rep. 2559 (3rd Cir. 1976) (applying *Moore* to cases arising in the state courts).

The Fourth Circuit.

The Fourth Circuit is the only one to have adopted the "farce, sham, mockery" standard without explicitly relying on *Diggs* or its progeny. In *Snead v. Smyth*, 273 F.2d 838 (4th Cir. 1959), it presented the test as if it were a basic proposition for which no authority need be cited. And indeed the *Snead* court cited no authority whatsoever.

The Fourth Circuit continues to pay lip service to the standard. However, beginning with *Coles v. Payton*, 389 F.2d 224 (4th Cir. 1968), it has been compiling a kind of "check list" of professional obligations which counsel must fulfill to provide constitutionally effective representation. A defense attorney must, for example, confer with his client, explain the elements of the charge to his client, ascertain possible defenses, conduct appropriate investigations (factual and legal), and allow himself adequate time to collect and prepare. 389 F.2d at 226. Fulfillment of these obligations would obviously lift the quality of representation well into the "prevailing level" category.

The Fifth Circuit.

In 1960, when first faced with the question of what standard to apply, the Fifth Circuit held that the Sixth Amendment required:

> "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960)

In subsequent cases the court appeared to retreat from *MacKenna*, adopting the "farce, sham, mockery" terminology and citing cases which rely (with the exception of one Fourth Circuit case) on *Diggs*. *Williams v. Beto*, 354 F.2d 698, 704 (5th Cir. 1965).

But in 1973 the court stated specifically that in *MacKenna* it had rejected the *Diggs* test, and that *MacKenna* is controlling. *West v. Louisiana*, 478 F.2d 1026, 1033 (5th Cir. 1973). It is clear from the discussion in *West* that the *MacKenna* standard contemplates a performance analogous to the Third Circuit's "prevailing level" standard.

The Sixth Circuit.

The Sixth Circuit initially adopted the *Diggs* test in *O'Malley v. United States*, 285 F.2d 733 (6th Cir. 1961). In doing so, it too relied on *Diggs* and its progeny. *Id.* at 734. It rejected the standard in *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974), with an exhaustive analysis of the Supreme Court cases related to the Sixth Amendment right to effective counsel and an authoritative discussion of *Diggs*, *Bruce*, and *West*, *supra*. The *Beasley* court's examination of *McMann v. Richardson* indicates that the Sixth Circuit also contemplates a prevailing level standard. 491 F.2d at 771.

The Seventh Circuit.

The Seventh Circuit was one of the earliest to adopt the "farce, sham, mockery" test, relying specifically on *Diggs*. *United States ex rel. Feeley v. Ragan*, 166 F.2d 976, 981 (7th Cir. 1948). Last year it "broadened" that standard, stating:

> "The criminal defendant, whether represented by his chosen counsel, or a public agency, or a court-appointed lawyer, has the constitutional right to an advocate whose performance meets a minimum professional standard . . . We now hold that the Constitution guarantees a criminal defendant legal assistance which meets a minimum standard of professional representation." *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640-41 (7th Cir. 1975)

The Eighth Circuit

The Eighth Circuit apparently had no occasion to rule on the question of what standard to apply until 1967. It then adopted the "farce, sham, mockery" test, without analysis. It merely cited cases from the Sixth, Tenth, and District of Columbia Circuits, all of which rely on *Diggs* directly or indirectly. *Cardarella v. United States*, 375 F.2d 222, 230 (8th Cir. 1967).[8]

The court has recently abandoned the *Diggs* standard. *Garton v. Swenson*, 497 F.2d 1137 (8th Cir. 1974) and *McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974), followed the *MacKenna* and *Bruce* line of cases. In *Johnson v. United States*, 506 F.2d 640 (8th Cir.), cert. den. 95 S. Ct. 1404 (1974), a "prevailing level" standard was specified.

The Military Courts.

The military courts have abandoned the "farce, sham, mockery" test. Indeed, they were among the first to do so. The Court of Military Appeals had adopted it in *United States v. Hunter*, 2 USCMA 601, 26 CMR 381 (1958), the court cited *Hunter* for the farce standard, but immediately went on to say:

8. *Cardarella* opinion was released one month prior to *Bruce*.

> "By that broad language we did not intend to be understood as saying that the highest degree of professional competency is not to be expected of an appointed defense counsel." 9 USCMA at 604.

The *Horne* court reversed the conviction because of counsel's inactivity at trial and his failure to present an entrapment defense.

In *United States v. Blunk*, 17 USCMA 158, 37 CMR 422 (1967), it was noted that "[t]his Court has consistently demanded 'the highest degree of professional competency . . . of an appointed defense counsel' [citing Horne]", and went on to indicate that the same standard applied to retained counsel. 17 USCMA at 160. In reversing a conviction for incompetency of counsel in *United States v. Evans*, 18 USCMA 3, 39 CMR 3 (1968), the court caustically remarked, "defense counsel did not fully understand that he is not *amicus* for the court-martial, but an advocate for the accused", 18 USCMA at 4, citing *Blunk* and *Horne*.

A CIRCUIT IN TRANSITION

The First Circuit, like the Eighth, was late in adopting the *Diggs* standard. *Bottiglia v. United States*, 431 F.2d 930 (1st Cir. 1970). It did so without making its own, independent analysis of the standard, merely relying on cases from the District of Columbia, Second, Ninth and Tenth Circuits. *Bruce, Scott*, and *MacKenna* are not mentioned, although *Bottiglia* relies on an older District of Columbia case which had, in effect, been superseded by *Bruce and Scott*. 431 F.2d at 931.

However, in two recent cases the court has strongly implied that it is merely waiting for the appropriate opportunity to substitute a standard such as the Fifth Circuit's *MacKenna-West* formula. In *Moran v. Hogan*, 494 F.2d 1220 (1st Cir. 1974), the court stated: "The instant

case is an inappropriate one for reassessment of this Circuit's standard because the alleged defect . . . was too insubstantial under either standard." 494 F.2d at 1222, fn. 4. And in *Dunker v. Vinzant*, 505 F.2d 503 (1st Cir. 1974), the court noted that trial counsel's performance had passed any test. At least one District Court has read *Dunker* and *Moran* as requiring it to test an attorney's performance by a "reasonably diligent and conscientious" standard as well as by the *Diggs* criteria. *Karger v. United States*, 388 F. Supp. 595 (D. Mass. 1975).

CIRCUITS WHICH CONTINUE TO APPLY THE "FARCE, SHAM, MOCKERY" TEST

The Second Circuit

This Circuit was one of the first to adopt the *Diggs* standard, *United States v. Wight*, 179 F.2d 376 (2nd Cir. 1949), cert. den. 338 U.S. 950 (1950), gave no reasons of its own for adopting the test. It merely relied on *Diggs*, its progeny in the District of Columbia Circuit, and *Feeley* in the Seventh Circuit. Numerous cases in this circuit have continued to apply that standard, e.g., *United States v. Currier*, 405 F.2d 1039 (2nd Cir.), cert. den. 395 U.S. 914 (1969) (relying on *Wight*), *United States v. Sanchez*, 483 F.2d 1052 (2nd Cir. 1973) (relying on *Currier* quoting *Wight*), *United States ex rel. Walker v. Henderson*, 492 F.2d 1311 (2nd Cir. 1974) (relying on *Wight* and its progeny).

Most recently, in *United States v. Yanishefsky*, 500 F.2d 1327 (2nd Cir. 1974), the Second Circuit reiterated its formulation of the *Diggs* test, i.e., whether the representation was so woefully inadequate as to shock the conscience. It noted that it had been invited to adopt the Sixth Circuit's "minimum level" approach, but declined to do so. 500 F.2d at 1333, fn. 2. The *Yanishefky* court did not explain why it declined the invitation. Nor did it offer

any justification for retaining the *Diggs* standard. As far as can be determined by *Yanishefsky*, the only rationale for continued adherence to the standard is the dead weight of *stare decisis*.

The Ninth Circuit

The "farce, sham, mockery" standard was adopted by the Ninth Circuit in *Latimer v. Cranor*, 214 F.2d 926 (9th Cir. 1954). In doing so it relied specifically on *Diggs* and on *Jones v. Huff*, *supra*, another District of Columbia case which itself relies on *Diggs*. No rationale other than precedent was given. The Ninth Circuit has continued to reiterate that standard, relying solely on precedent. See, e.g., *United States v. Stern*, 519 F.2d 521 (9th Cir. 1975). It has never attempted to justify the test qua test. It has never re-examined the standard in light of *Bruce*, *Scott*, *Beasley*, et al.[9]

The Tenth Circuit

In adopting the *Diggs* standard, *Frand v. United States*, 301 F.2d 102 (10th Cir. 1962), the Tenth Circuit relied on *Mitchell v. United States*, 259 F.2d 787 (D.C. Cir.), cert. den. 358 U.S. 850 (1958) (which relies on *Diggs*), and on *Black v. United States*, 269 F.2d 38 (9th Cir. 1958) (which relies on *Latimer*, *supra*, which in turn relies on *Diggs*). As with the Second and Ninth Circuits, the Tenth Circuit has failed to reappraise the standard in light of *Bruce*, *Scott*, *Moore*, *Beasley*, et al. It, too, has been mesmerized by *stare decisis*.

COMMENTATORS

Commentators are universally opposed to the "farce, sham, mockery" test. One distinguished judicial critic has

9. In *Brubaker v. Dickson*, 310 F.2d 30 (9th Cir. 1962), the court cited *MacKenna* with approval. This appears to be an aberration, however.

attacked the standard as "itself a mockery of the sixth amendment". Bazelon, *Defective Assistance of Counsel*, 42 U of Cinn. L. R. 1, 28 (1973). See Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 Va. L.R. 927 (1973); Finer, *Ineffective Assistance of Counsel*, 58 Corn. L.R. 1077 (1973) (suggesting the proper standard is "whether counsel exhibited the normal and customary degree of skill possessed by attorneys who are *fairly skilled in the criminal law and who have a fair amount of experience at the criminal bar.*" Id. at 1080, emphasis in original); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 N.W.U.L.R. 289 (1964); Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 Harv. L.R. 1434 (1965). Counsel has been unable to find any critics upholding the "farce, sham, mockery" test on its merits.

THE STATE COURTS IN THE SECOND CIRCUIT

Connecticut

On March 2, 1976, the Connecticut Supreme Court abandoned the "farce, sham, mockery" test. *State v. Clark*, 18 Cr. L.Rep. 2558. In its place, the court adopted a standard similar to that proposed by Finer, *supra*, holding that the defense attorney's performance must be "within the range of competence displayed by lawyers with ordinary training and skill in the criminal law." *Id.* at 2559.

New York

New York, like the Fourth Circuit, continues to pay lip service to the "farce, sham, mockery" standard. However, it too has begun to "spell out" the affirmative duties of counsel, and in fact relies on *Coles v. Payton, supra*, in doing so. *People v. Bennett*, 29 N.Y.2d 462, 466-67, 329 N.Y.S.2d 801, 804 (1972); *People v. Labree*, 34 N.Y. 2d 257, 260-61, 357 N.Y.S.2d 412, 414-15 (1974).

Vermont

Vermont, while using the "farce, sham, mockery" terminology, declares its standard thus:

> "We have, therefore, while expressing the lesser standard of 'mockery of justice', at the same time carefully reviewed the complained-of conduct to test its conformity with the standards of reasonable competence, thus justifying our own comment that there is 'neither uniformity of discussion nor certainty' on the point in question. [*In re Bousley*, 130 Vt. 296] at 299, 292 A.2d [249] at 252 [(1972)]. *In re Cronin*, ——Vt.——, 336 A.2d 164, 168 (1975)

The Vermont Supreme Court went on to cite *MacKenna, supra*, and the Third Circuit's "prevailing level" standard as expressing "the modern weight of authority, and the better view," and noted that the United States Supreme Court appeared to have endorsed that standard in *McMann, supra*. [336 A.2d at 168]

The Vermont Court in *Cronin* also dealt with the oft-asserted argument that a particular attorney had in the past demonstrated skill in criminal defense:

> "As a matter of common knowledge, the most competent counsel may, from time to time, deviate seriously from standards of reasonable competence, and it is no complete answer to say to a respondent that his attorney has demonstrated great proficiency in other cases. His concern is his own case; his right is reasonable competence in this case." 336 A.2d at 168.

Thus, all three states within this Circuit have moved beyond the unmodified "farce, sham, mockery" standard.

GIDEON'S TRUMPET HAS SOUNDED

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69. The

right to be heard likewise would be of little avail if it did not include the right to be heard by effective and competent counsel. Effective assistance of counsel is central to our adversary system. The right to notice, confrontation, compulsory process would stand naked and alone if effective assistance simply meant a warm body making sounds. An effective attorney breathes life into a trial. His special skill gives meaning to the Sixth Amendment and without him the Sixth Amendment becomes a whisper.

The dead hand of the past governs us from the grave. An irrational standard, "farce, sham and mockery of justice" exists in several circuits who stubbornly refuse to join the others in the adoption of a more rational and reasonable definition of an attorney's performance and duties. There are those who also would allow brain surgery to be performed by cretins.

The United States Court of Appeals for the Second Circuit teeters on the ledge of change. Yet it refuses to take the plunge. The Second Circuit has a respected reputation. Its decisions have been cited with approval by many courts. Its reluctance in the area of effective assistance of counsel, is difficult to understand, particularly so when the rule it embraces so ardently has no rational basis, if it ever had one.

Concern has been expressed in all areas of the profession about the quality of legal representation found in our courts. Chief Justice Burger assumes "as a working hypothesis that from one-third to one half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation." Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice*? 42 Ford. L.R. 227, 234 (1973) The Second Circuit has led a movement in an attempt to improve the quality of legal assistance. *See* Kaufman, *Address at County Lawyers Dinner*, N.Y.L.J. December 7, 1973, p. 1. It is mind-

boggling for the Second Circuit on the one hand to seek to improve legal services while on the other it refuses to protect the criminal defendant from the tender mercies of unqualified trial lawyers unless the performance sinks to the level of a farce, a sham and a conscience shocking mockery.

What constitutes due process changes with the times. The beauty of the common law is that it recognizes and accommodates such evolving concepts. It does not become a slave to precedent and Courts cannot abdicate their duties—which is their glory—to re-examine stale holdings and create new ones which recognize present human conditions.

The examination when it is claimed that counsel's performance was incompetent or ineffective, demands a close scrutiny of the total picture. Individual miscalculations, "strategic decisions" when taken alone might often be characterized as human error. However an examination of the Rickenbacker trial record finds error after error, miscalculation after miscalculation followed by "strategic error after strategic error." The opinions in Rickenbacker, majority and dissent, agree that counsel's performance did not approach "the farce, sham and mockery" standard with an additional observation by the majority that counsel's performance did not fail by any standard. To arrive at this conclusion the majority created a peculiar balance pan in which a handful of pluses in the abstract will outweigh a plethora of indicia of incompetence. Thus trial counsel is twice complimented (Appendix A 9a-10a, 11a) for preventing the introduction of prior convictions—the exclusion of which is virtually automatic in New York State. He gained another plus for arguing identification, although the majority damns him with faint praise because it cannot say that the argument was effective or that the record was sufficiently developed for effective argument. Although counsel ob-

jected to some of the prosecutor's arguments during summation, the quoted comment was allowed to slip by—a comment that should have commanded reversal upon direct appeal.

> "You know, and you will be told in no uncertain terms that the verdict must be unanimous, and if one juror is fooled, the People have lost the case and I don't mean like Baltimore losing to Pittsburg. We've lost it on behalf of the People of the State of New York, to bring a defendant to justice whom the People feels merits justice in the form of a guilty verdict." (T170)

Such thin gruel, excerpted at random cannot be sufficient to overcome the heavy evidence that established incompetence.

Judge Oakes, in agreement with the majority that the petitioner's conduct while not approaching a farce, sham and a mockery characterized counsel's efforts as "hopelessly inept." (Appendix A, p. 12a) The ineptness was documented by Judge Oakes in language most acid:

> "In my view it was unreasonably incompetent for appellant's counsel not to drive home the fact that neither Fichera, the store owner, nor Petrancosta, the victim's son, could identify the defendant and not to query Officer Walsh regarding the weapon he said he had found, the absence of fingerprints on it, and his opportunities for observation of the third man during the chase. Counsel did not even object to the introduction of the weapon. These examples could be multiplied; I need not belabor the point, as I think footnotes 1-4 of the majority opinion are almost self-compelling. When these are considered along with the facially absurd proposition advanced by counsel in summation, that perhaps it was a shot from

> Fichera's own weapon that killed Vito Petrancosta, it is a wonder that the jury took as long as it did to convict."

The dissent then recommended that

> "Gideon's Trumpet has long since sounded. We should join the several other circuits that have rejected *Diggs* as no longer having precedential value and declare it a dead letter, bringing the law of our circuit into line with the rule of, *e.g.*, *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973), that, under the Sixth Amendment, "a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent, conscientious advocate," *id.* at 1202 (emphasis omitted). *See also* Finer, *Ineffective Assistance of Counsel*, 58 Cornell L. Rev. 1077 (1973); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U. L. Rev. 289 (1964); Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 Harv. L. Rev. 1434 (1965)."

See also *United States v. Taylor et al.* No. 76-1210, 1256, 1264-66, 1288. Slip op. pp. 2829-30 (2d Cir. Apri. 13, 1977).

An example of trial counsel's inexcusable ineptness is his failure to prepare.

The majority opinion overlooks this and the decision in *Hardy v. United States*, 375 U.S. 278 (1964). There, an indigent federal defendant desired to prosecute an appeal from his conviction, but his appointed trial counsel had withdrawn. The appeal therefore had to be perfected with the aid of a new attorney. Under the rules and practices then prevailing, defendant could not obtain more than a partial trial transcript. Only those portions of the record in which error allegedly occurred would be provided. Any

allegation of error necessarily was advanced by the accused or his trial counsel, since appellate counsel was a stranger to the trial.

On certiorari, the Supreme Court construed the pertinent statutes as requiring the government to furnish a complete transcript, because otherwise "counsel's duty cannot be discharged." 375 U.S. at 282; see also *id.* at 280.

It is impossible to harmonize the majority's finding of competent counsel under any standard[10] (Appendix A 9a-

10. The judges of most sister circuits might not care to be painted with the *ipse dixit* of Judge Smith's constitutional brush. In the unlikely event that the District of Columbia Circuit would tolerate trial counsel's incredible theory of the case, it would undoubtedly remand for an evidentiary hearing to determine whether the sudden abandonment of the intent to present defense witnesses (Slip 1069) reflected considered strategy or inexcusable failure to prepare for trial. *Cf. United States v. DeCoster* [II], ___ F.2d ___, 20 Cr.L. 2080 (D.C. Cir. 1976).

The Third and Fourth Circuits would undoubtedly grant relief upon finding that trial counsel had breached his duty to read the mistrial transcript in preparation for the retrial. *Cf. Moore v. United States*, 432 F.2d 730 (3d Cir. 1970) (en banc); *Coles v. Peyton*, 389 F.2d 224 (4th Cir. 1968).

The Fifth Circuit would not likely have found that trial counsel was "rendering reasonably effective assistance," *United States v. Fessel*, 531 F.2d 1275, 1278 (5th Cir. 1976); especially when that court applies a less stringent standard in cases of assigned, rather than retained, counsel. *Cf. U.S. ex rel. Reis v. Wainwright*, 525 F.2d 1269 (5th Cir. 1976). The Sixth Circuit, as Judge Smith observes, follows the same standard. Slip 1071.

The Seventh and Eight Circuits are aligned with the Third Circuit in applying variants of the civil malpractice standard. *See* cases cited at Slip 1071.

Although the Ninth Circuit position is identical to the Second Circuit, *see United States v. Stern*, 519 F.2d 521 (9th Cir. 1975); in a capital case—which but for the fortuitous intervention of time and place the present case might have been—that circuit has applied the Fifth Circuit's rule. *Brubaker v. Dickson*, 310 F.2d 30 (9th Cir. 1962), *citing McKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960).

It seems more than likely that the First Circuit would have accepted the present appeal as the long-desired vehicle for discarding the "farce, sham, mockery-of-justice" standard. *See Dunker v. Vinzant*, 505 F.2d 503 (1st Cir. 1974); *Moran v. Hogan*, 494 F.2d 1220 (1st Cir. 1974); *cf. Karger v. United States*, 388 F.Supp. 595 (D. Mass. 1975) ("reasonably diligent and conscientious" standard applied).

10a) with the Supreme Court's recognition in *Hardy* that effective representation presupposes familiarity with the whole case. Surely if meaningful appellate advocacy necessarily entails familiarity with the whole trial record, meaningful trial advocacy necessarily entails familiarity with the record of a prior mistrial.[11]

Appellant's trial counsel had no familiarity with the record of the mistrial. This is proven by his trial conduct. He could not rationally have disputed the *corpus delecti*, and all but conceded the questionable identification of his client, unless he was oblivious to the events at the prior trial. The first jury hung because the witnesses to the crime could identify the other co-defendants, but not appellant. At the second trial, none were cross-examined to develop their non-recognition of the accused as a perpetrator. The first jury heard Officer Walsh base his identification of appellant on glimpses gained during a few *seconds* of chase. The second jury never learned that seconds has been converted into *minutes*—because trial counsel forfeited the opportunity to impeach by prior inconsistent statements. This was no considered trial strategy; this was inexcusable ignorance, utter lack of preparation.

Surely if the State had withheld the mistrial transcript, this Court would invalidate appellant's conviction. *Cf. Hardy v. United States, supra; United States v. Durant*, ___F.2d___, Slip 635 (No. 76-1198, 2d Cir. 1976) (refusal to provide funds for defense to hire expert; statutory construction). In the wake of *Griffin v. Illinois*, 351 U.S. 12 (1956), and its progeny, it is beyond dispute that the State could not constitutionally handcuff appellant by withholding the mistrial transcript. But appointed trial

11. The force of this argument is augmented by the holding in *Ross v. Moffit*, 417 U.S. 600 (1974). There trial counsel is deemed much more important than appellate counsel. The former is both a sword and a shield, sparring with the benefit of the presumption of innocence; the latter is but a sword, contesting the manner in which guilt was established.

counsel, the panel holds, is free to manacle himself by ignoring that transcript. How easily the Court forgets that "defendant, and not his lawyer or the State, will bear the personal consequences of a conviction." *Faretta v. California*, 422 U.S. 806, 834 (1975).[12]

The "farce, sham, mockery of justice" criterion is deserving of its own short chapter in the history of constitutional jurisprudence. From its ill-considered first appearance in *Diggs v. Welch*, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945), much like Topsy it "just growed." It was adopted by every circuit and the military judiciary, although some had discarded it before the later arrivals discovered it.

As Judge Oakes points out, "*Diggs* simply cannot withstand analysis." (Appendix A-12a). No court that has attempted an analysis has adhered to the *Diggs* standard. No commentator has attempted to justify its continued application. See Stone, *Ineffective Assistance of Counsel and Post-Conviction Relief in Criminal Cases: Changing Standards and Practical Consequences*, 7 Col. Human Rights L. Rev. 427 (1975), for the most recent survey of the case law and literature.

In reality, the application of the *Diggs* doctrine in this Circuit has produced a singular result. Except where

12. In reality, the Second Circuit seems to have chosen to humiliate trial counsel for his indecent Second Circuit performance, by publishing notice to that effect. To that extent, the panel has disproved the substance of the quotation from *Faretta*.

It is surely a Court's preogative to expose deserving members of the bar to scorn. But it is a bit discomfitting when this is done without notice and an opportunity to be heard. It is even more discomfitting to observe the Court pillory counsel for his failure to protect appellant's interests, when the Court refuses to extend its protection to the same interests. Appellant finds slight solace and much cause for bitterness in the majority's determination to forfeit his freedom while ridiculing his trial counsel. It is as though Humpty Dumpty controlled the meaning of effective representation. *See* L. Carroll, *Through the Looking Glass* ch. 6 (1871).

matters *dehors* the record demonstrate a strong probability that counsel's strategic decisions " 'pertained only to his own considerations' " *U.S. ex rel. Maselli v. Reincke*, 383 F.2d 129 (1967) or those of another client, counsel's uncomplaining presence at trial is invariably sufficient to defeat an assertion of ineffective assistance. The *Diggs* formula is reminiscent of the Emperor's new clothes; the rest of the world knows the truth of the matter. It is long since time to abandon such a shameless conceit, and breathe new life into the sixth amendment's promise.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED AND THE DENIAL AND DISMISSAL OF THE WRIT OF HABEAS CORPUS REVERSED.

Respectfully submitted,

AARON J. JAFFE
ALBERT J. KRIEGER

Of Counsel:
AARON J. JAFFE
FREDERIC GROSS

APPENDIX "A"

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 39—September Term, 1976.

(Argued September 14, 1976 Decided December 22, 1976.)

Docket No. 76-2036

ROBERT RICKENBACKER,

Relator-Appellant,

v.

THE WARDEN, AUBURN CORRECTIONAL FACILITY, and
THE PEOPLE OF THE STATE OF NEW YORK,

Respondents-Appellees.

Before:

SMITH, OAKES and MESKILL,

Circuit Judges.

Appeal from denial of petition for a writ of habeas corpus by the United States District Court for the Eastern District of New York, Thomas C. Platt, Jr., *Judge*. Appellant's petition is based on a claim that his counsel at trial for murder was so incompetent as to violate his sixth amendment rights.

Affirmed.

AARON J. JAFFE, New York, N.Y. (Molly Colburn, Law Student, on the brief), *for Appellant.*

LILLIAN Z. COHEN, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, of Counsel), *for Appellees.*

SMITH, *Circuit Judge:*

Robert Rickenbacker appeals from the denial of his petition for a writ of habeas corpus by the United States District Court for the Eastern District of New York, Thomas C. Platt, Jr., *Judge.* On appeal Rickenbacker's sole claim is that his counsel at his trial for murder was so incompetent as to violate his sixth amendment rights. We find no error and affirm the denial of his petition.

I.

About 6:30 p.m. on July 30, 1970 three men entered a grocery store in Brooklyn. During the ensuing robbery a man helping the store owner was killed. Two nearby New York City patrolmen, Thomas Walsh and Donald Scannapieco, heard shots and went toward the store. They saw three men running in the direction of a parked gypsy taxi containing a fourth man. Scannapieco arrested one of the three robbers and the man in the taxi. Walsh chased the other two men through the streets and a store, first in his patrol car and then on foot. He captured one robber, and the other one escaped. The police were told that the escapee was Rickenbacker and that he lived at 63 Decatur Street in Brooklyn. Police went to that address and were unable to locate Rickenbacker, despite a search of the neighborhood. About eight months later, on March 11, 1971, Detective Robert Marshall, who was in charge of the investigation, saw appellant in the police station while he

was in custody for another unrelated offense. Marshall asked him his name and address. When he responded Robert Rickenbacker, 63 Decatur Street, he was arrested.

The driver of the parked car pleaded guilty to a lesser offense during the first trial in May, 1971. While the jury could not agree on a verdict as to Rickenbacker, it found the other two men guilty of murder. At Rickenbacker's second trial in October, 1971 he was represented by Joseph Lombardo, another court-appointed attorney. At the second trial, in New York Supreme Court (Kings County), the jury deliberated less than two hours and found him guilty of murder. He was sentenced to 25 years to life imprisonment and is currently confined in Auburn Correctional Facility.

His conviction was affirmed without opinion by the Appellate Division, Second Department, and leave to appeal to the New York Court of Appeals was denied on November 14, 1974. He then filed a petition for a writ of habeas corpus, which was denied by Judge Platt on February 24, 1976.

II.

Rickenbacker argues that his attorney's incompetence is shown by (1) his failure to make an opening statement, (2) his failure to object to the introduction of a gun, (3) his failure to object to portions of the charge to the jury, (4) his inadequate cross-examination, (5) his ineffective closing argument, and (6) his failure to object to portions of the government's closing argument. While we find no merit in the first three claims, the last three raise troublesome issues.

The testimony at the trial took some two hours to present. The government presented seven witnesses, and Rickenbacker presented none.

Sam Fichera, the owner of the store, testified and described the robbery. He said he was able to identify only two of the robbers, Morgan and Ferguson, and that Morgan had had a gun. On cross-examination he answered nine questions about the gun he owned and which he had fired at the robbers while pursuing them.[1]

Michael Petrancosta, who was helping Fichera at the time of the robbery and who is the son of the victim, testified and described the robbery. He said he was able to identify one robber, Morgan, and that Morgan had had a gun. There was no cross-examination.

---

1 The entire cross-examination of Fichera was:

Q. Did you say you own a 38 Smith and Wesson? A. Yes.

Q. After this incident that you've testified to, was that weapon ever examined ballistically by the Police Department? A. They did. Somebody that came at—the Police Department checked it out.

THE COURT: Did someone examine it, yes or no?

THE WITNESS: Yes, at the Police Department.

Q. By examining it, did they fire the gun? A. I don't know.

MR. SCHMIER: Objection, your Honor.

THE COURT: Objection sustained.

Q. What did you see them do?

MR. SCHMIER: Objection.

THE COURT: They examined it, he said.

A. I handed them the gun and they went in another room and I don't know what happened.

Q. How long did they have the gun? A. What's that?

Q. How long did they have the gun? A. Not long, about half an hour after I was being questioned at the police station.

Q. And—

THE COURT: (int'g) They gave the gun back to you?

THE WITNESS: Right.

Q. They gave the gun back to you? A. Yes.

Q. Did you hear the gun being fired at any time?

MR. SCHMIER: Objection, your Honor.

THE COURT: You heard the gun fired when you fired it? You say you fired two shots?

MR. LOMBARDO: I don't mean that, your Honor. While the police had it.

THE COURT: Objection sustained.

MR. LOMBARDO: I have no further questions.

Patrolman Thomas Moore testified that he saw the victim after the robbery and that he was dead. There was no cross-examination.

Patrolman Walsh testified and said he saw three men running toward the taxi and that two, Morgan and Rickenbacker, were carrying guns. He described the chase and identified Rickenbacker as the person who had eluded him. He said that during the chase Rickenbacker threw a gun between the two parked cars. The gun was later retrieved and was introduced in evidence. On cross-examination Walsh answered nine questions and said that during the chase, which lasted three or four minutes, the robbers were running fast and that he had turned possibly five corners.[2]

Patrolman Scannapieco testified that he saw three men run toward the taxi and that two, Morgan and Rickenbacker, were carrying guns. He said that Rickenbacker ran

---

2 The entire cross-examination of Walsh was:

Q. Officer, during the time that you say you were chasing these two men, at any time were they walking or were they always running? A. Always running.

Q. So, in answer to Mr. Schmier's question, when you said it was a chase, it was, in effect, a chase, they were running and you were chasing; is that correct? A. Yes, sir.

Q. And were they running, in your opinion, as fast as they could? A. They were running fast.

Q. They were running fast. Did I understand you to testify that at one point you got into your car after you had seen the two men running away and turned the corner to chase them; is that correct? A. Yes, sir.

Q. Now, did you turn a corner more than once while you were chasing them? A. Yes.

Q. How many times? A. In total possibly five times.

Q. All right. Could you tell me, sir, how much time elapsed from the time you first saw the three defendants until the time that you apprehended the one defendant you have told us about? A. From the initial time I saw them until I apprehended Ferguson?

Q. Yes, sir. A. Three or four minutes, possibly.

Q. That would be your best estimate; is that correct? A. Yes, approximately I would have to say.

MR. LOMBARDO: No further questions.

within 20 feet of him and that he saw his face. He then identified Rickenbacker. On cross-examination he answered seven questions and said all three robbers were male Negroes.[3]

Detective Marshall testified that he searched 63 Decatur Street and other places in the neighborhood for about a month and was unable to find Rickenbacker and that when he was arrested on March 11 Rickenbacker gave 63 Decatur Street as his home address. On cross-examination he answered four questions and said that the first time he had ever seen Rickenbacker was on March 11 at the Brooklyn police station.[4]

The identification testimony concerning Rickenbacker was essentially the same as in the first trial, in which the jury failed to agree. In the second trial the state for the first time brought in the evidence of Rickenbacker's absence from his usual haunts on a theory of flight to avoid prosecution. Lombardo succeeded in keeping out evidence

---

3 The entire cross-examination of Scannapieco was:

Q. Officer, these three men that you say you first saw running in your direction, were they all the same color? A. Color, sir?

Q. Yes, were they all black? A. All male Negroes.

Q. All male Negroes. When you first saw them, were they running in your direction? A. Yes, sir.

Q. And then the other two turned and ran back away from you, is that your testimony? A. Which other two, sir?

Q. The two that did not get into the car. A. Yes, sir, they turned.

Q. They turned and ran; is that correct? A. Yes, sir.

Q. And your partner then gave chase? A. Correct, sir.

MR. LOMBARDO: No further questions.

4 The entire cross-examination of Marshall was:

Q. Officer, did I understand you to say that when you first saw the defendant, you saw him at a police station? A. Yes, I did.

Q. When was that? A. March 11th of this year.

Q. In Brooklyn? A. Sixty-seventh Precinct in Snyder Avenue.

Q. Do you know whether or not he had been arrested in Brooklyn? A. Yes, sir.

MR. LOMBARDO: No further questions.

the state sought to adduce that Rickenbacker had failed to make his weekly report to his parole officer during the eight months between the holdup and his arrest.

Dr. Wald, the medical examiner, testified that the victim died from a gunshot wound. There was no cross-examination.

At the close of the state's case Rickenbacker's attorney told the court that Rickenbacker wanted to call some witnesses. After some discussion between Rickenbacker and his attorney, the defense decided not to call any witnesses.

Rickenbacker's attorney gave a brief (13 double-spaced typed pages) summation in which he stressed the failure of the state to introduce any fingerprints from the gun Rickenbacker allegedly threw between the two parked cars, the failure of Fichera and Petrancosta to identify Rickenbacker, the circumstances under which Walsh and Scannapieco saw the robber during the chase, the meager efforts the police made to find Rickenbacker, and the fact that Rickenbacker was later found in Brooklyn.

The state's closing argument emphasized Rickenbacker's flight from his home and the reliability of the identification by Walsh and Scannapieco. During his argument the prosecutor said, without objection, "if one juror is fooled, the People have lost the case and I don't mean lose like Baltimore losing to Pittsburgh. We've lost on behalf of the People of the State of New York, to bring a defendant to justice whom the People feel merits justice in the form of a guilty verdict."

III.

Rickenbacker concedes that in this circuit the standard for inadequate counsel was enunciated in *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950). "[U]nless the purported representa-

tion by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus. . . . A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." This court has reaffirmed this standard numerous times in recent years. *Lunz* v. *Henderson*, 533 F.2d 1322, 1327 (2d Cir. 1976); *United States* v. *Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *United States ex rel. Walker* v. *Henderson*, 492 F.2d 1311, 1312 (2d Cir.), *cert. denied*, 417 U.S. 972 (1974); *United States* v. *Sanchez*, 483 F.2d 1052 (2d Cir. 1973), *cert. denied*, 415 U.S. 991 (1974); *United States ex rel. Marcelin* v. *Mancusi*, 462 F.2d 36, 42 (2d Cir. 1972), *cert. denied*, 410 U.S. 917 (1973); *United States ex rel. Scott* v. *Mancusi*, 429 F.2d 104, 109 (2d Cir.), *cert. denied*, 402 U.S. 909 (1971); *United States* v. *Katz*, 425 F.2d 928, 930-31 (2d Cir. 1970).

We agree with Judge Platt that by the *Wight* standard Rickenbacker's attorney was not so incompetent as to warrant reversing Rickenbacker's conviction.

Wight is based on the due process clause of the fifth amendment and the assistance of counsel clause of the sixth amendment. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) and its progeny rest on the sixth and fourteenth amendments. *Scott* v. *United States*, 427 F.2d 609, 610 (D.C. Cir. 1970) (per curiam).

Rickenbacker invites this court to follow other courts in rejecting the "farce and mockery" standard. The District of Columbia Circuit, which originated the "farce and mockery" standard in *Diggs* v. *Welch*, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945), has now said that the test is whether the defendant had "reasonably competent assistance of an attorney acting as his diligent

conscientious advocate." *United States* v. *DeCoster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973). The Third Circuit says "the standard of adequacy of legal services as in other professions is the exercise of the customary skill and knowledge which normally prevails at the time and place." *Moore* v. *United States*, 432 F.2d 730, 736 (3d Cir. 1970) (*en banc*). The Fifth Circuit has said the test is having "counsel reasonably likely to render *and rendering* reasonably effective assistance." *United States* v. *Fessel*, 531 F.2d 1275, 1278 (5th Cir. 1976). The Sixth Circuit has also adopted this standard. *United States* v. *Toney*, 527 F.2d 716, 720 (6th Cir. 1975). The Seventh Circuit has said that the attorney's performance must meet "a minimum professional standard." *United States ex rel. Williams* v. *Twomey*, 510 F.2d 634, 640 (7th Cir.), *cert. denied sub nom. Sielaff, Corrections Director* v. *Williams*, 423 U.S. 876 (1975). The Eighth Circuit has said "the standard would be to test for the degree of competence prevailing among those licensed to practice before the bar." *Johnson* v. *United States*, 506 F.2d 640, 646 (8th Cir.), *cert. denied*, 420 U.S. 978 (1974).

In the context of cases where a defendant claims he pleaded guilty because he had incompetent counsel, the Supreme Court has held that the defendant must show that his attorney's advice was "outside the 'range of competence demanded of attorneys in criminal cases.'" *Tollet* v. *Henderson*, 411 U.S. 258, 268 (1973), quoting *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970).

IV.

It may be that this court should reconsider the standard set forth in *Wight*. But we need not decide this issue now, for we conclude that the performance of Rickenbacker's counsel does not fail to meet any of the sug-

gested standards, all of which involve the heavy burden of establishing incompetence.

Review of the records of the two trials reveals apparent weaknesses in Lombardo's performance. Walsh's testimony in the first trial measured the time Rickenbacker was in his sight during the chase in seconds, in the second trial at three or four minutes possibly. Lombardo did not focus in cross-examination on the time discrepancy, but brought out the fast running and the corners turned. While Lombardo sought unsuccessfully a second *Wade* hearing on the claim that Walsh's identification was tainted by the circumstances of his observation of a photograph of Rickenbacker after the chase and before identification at the trial, he chose not to explore the subject on cross-examination.

Lombardo was unsuccessful in keeping from the jury evidence from which the jury could infer that Rickenbacker was in flight or hiding for some eight months after the crime, although he did succeed in keeping out proffered evidence that Rickenbacker had failed to make required weekly reports to his parole officer during the period.

Lombardo's summation, while somewhat longer than that of counsel in the first trial, covered only 12 pages of transcript. It did however argue the questions of identification and flight and there is no way we can really assess the manner of its delivery or its impact. The jury did call for the reading of the full testimony of Officers Walsh and Scannapieco, the identifying witnesses.

Rickenbacker's attorney had access to the transcripts of the first trial and the prior hearing called for by *United States* v. *Wade,* 388 U.S. 218 (1967). Reading the results of past cross-examination of the state's witnesses, Rickenbacker's attorney may reasonably have concluded that more extensive cross-examination would strengthen rather than weaken the state's case. His closing argument, while

brief, did discuss all the important points the jury should consider. The prosecutor's remark in summation was objectionable and should have called forth a protest and request for censure. To other remarks Lombardo did object. That he let one slip by is not, we think, sufficient to establish incompetence. The courts cannot guarantee errorless counsel or counsel who cannot be made to seem ineffective by hindsight. The fact that "the case could have been better tried" is not sufficient reason to sustain appellant's claim. *United States* v. *Katz,* 425 F.2d at 931. Both the trial judge and the habeas corpus judge considered the performance of Lombardo, with whose competence they were familiar, satisfactory.[5] We cannot say that his performance was outside the required level of competence.

Affirmed.

---

5 Professional integrity, not financial reward, is currently the only incentive for an experienced attorney to prepare thoroughly when he acts as appointed counsel. The record indicates that Rickenbacker's appointed attorney received a fee of "$500 or $750" (Appendix, S-11).

OAKES, *Circuit Judge* (dissenting):

I agree that, in all probability, Rickenbacker's defense counsel's performance, while hopelessly inept, was probably not a "farce and mockery" within the long line of cases in this circuit referred to by the majority, despite such features as "cross" examinations of the key prosecution witnesses that served only to give the witnesses an opportunity to repeat their direct testimony. But, particularly in view of this court's promotion of higher standards of advocacy, in the wake of Chief Judge Kaufman's well-chosen remarks,[1] I think the time has come to follow the lead of the six other circuits (including the originating circuit) that have rejected the rule of *Diggs* v. *Welch*, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945). And I cannot agree that counsel's performance here was up to the standard of reasonable competency to which the better rule speaks.

Judge Smith for the majority has, as always, stated the facts fully and fairly, so they need not be restated. In my view it was unreasonably incompetent for appellant's counsel not to drive home the fact that neither Fichera, the store owner, nor Petrancosta, the victim's son, could identify the defendant and not to query Officer Walsh regarding the weapon he said he had found, the absence of fingerprints on it, and his opportunities for observation of the third man during the chase. Counsel did not even object to the introduction of the weapon. These examples could be multiplied; I need not belabor

1 *See, e.g.*, Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A.J. 175 (1974); *New Admission Rules Proposed for Federal District Courts*, 61 A.B.A.J. 945 (1975) (summary of work of advisory committee to Second Circuit Judicial Conference and of advocacy qualifications for admission to Second Circuit bar). *See also* Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 Fordham L. Rev. 227 (1973).

the point, as I think footnotes 1-4 of the majority opinion are almost self-compelling. When these are considered along with the facially absurd proposition advanced by counsel in summation, that perhaps it was a shot from Fichera's own weapon that killed Vito Petrancosta, it is a wonder that the jury took as long as it did to convict.

United States v. *Wight*, 176 F.2d 376 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950), the case that established our circuit's "farce and mockery" standard, followed *Diggs* and its District of Columbia Circuit progeny and *United States ex rel. Feeley* v. *Ragen*, 166 F.2d 976 (7th Cir. 1948), which also relied on *Diggs*, *id.* at 981. As the majority opinion recognizes, both the District of Columbia and Seventh Circuits, along with four others, have now abandoned this standard. *Diggs* simply cannot withstand analysis. The Supreme Court cases on which it relied, 148 F.2d at 669 n.3,[2] all held that, where the trial proceedings had been turned into a farce or mockery of justice, a conviction could not stand; none held that the proceedings *must* have come to that point to warrant judicial intervention. The principal rationale advanced in *Diggs*, *id.* at 670, that "[i]n many cases there is no written transcript," thereby giving a habeas petitioner "a clear field for the exercise of his imagination" (and thereby presumably inundating the federal courts), no longer holds true, since written transcripts are now generally available. Gideon's Trumpet has long since sounded.[3] We should

2 The five cases cited were *Moore* v. *Dempsey*, 261 U.S. 86 (1923) (mob violence); *Powell* v. *Alabama*, 287 U.S. 45 (1932) (mob violence; no counsel appointed); *Mooney* v. *Holohan*, 294 U.S. 103 (1935) (knowing use of perjured testimony by prosecutor; writ not issued for failure to exhaust state remedies); *Brown* v. *Mississippi*, 297 U.S. 278 (1936) (coerced confession); and *Johnson* v. *Zerbst*, 304 U.S. 458 (1938) (no counsel at trial).

3 *See Gideon* v. *Wainwright*, 372 U.S. 335 (1963); A. Lewis, *Gideon's Trumpet* (1964).

join the several other circuits that have rejected *Diggs* as no longer having precedential value and declare it a dead letter, bringing the law of our circuit into line with the rule of, *e.g.*, *United States* v. *DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973), that, under the Sixth Amendment, "a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent, conscientious advocate," *id.* at 1202 (emphasis omitted). *See also* Finer, *Ineffective Assistance of Counsel*, 58 Cornell L. Rev. 1077 (1973); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U. L. Rev. 289 (1964); Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 Harv. L. Rev. 1434 (1965).

Forty-four years ago, Mr. Justice Sutherland wrote: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932). In 1976 I think our court should recognize that the right is equally meaningless if counsel is not at least reasonably competent.

I dissent.

APPENDIX B—OPINION OF THE UNITED STATES DISTRICT COURT JUDGE FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA ex rel. ROBERT RICKENBACKER,

Petitioner.

-against-

THE WARDEN, AUBURN CORRECTIONAL FACILITY and THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

---

75 C 634

MEMORANDUM AND ORDER

February 24, 1976

PLATT, D.J.

By a petition for a writ of habeas corpus, Robert Rickenbacker challenges an allegedly illegal conviction imposed by the State of New York in violation of the United States Constitution. Title 28 U.S.C. §§2241 and 2254.

Petitioner, a citizen and resident of New York, is currently confined in Matteawan State Hospital, Beacon, New York, in the custody and control of the Director of that institution.[1] He was convicted after a jury trial of the crime of murder and was sentenced in the Supreme Court (Kern, J.) of Kings County to twenty-five (25) years to life imprisonment.

The judgment of conviction was unanimously affirmed without opinion by the Appellate Division, Second Department (*People v. Rickenbacker*, 46 A.D.2d 740 [2d Dept. 1974]) and leave to appeal to the New York Court of Appeals was denied on November 14, 1974 (Stevens, J.).

Here, petitioner raises four issues that have been previously presented to the state courts on direct appeal and which he contends violated his constitutional rights: (1) the court's charge on flight coupled with the trial judge's comments was so prejudicial as to deny petitioner a fair trial; (2) a statement by petitioner was introduced at his trial in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966); (3) his Sixth and Fourteenth Amendment rights were violated when a detective testified regarding his interrogation of petitioner's accomplices; and, (4) he was denied adequate assistance of counsel. As to each of these issues, petitioner has exhausted the available state court remedies and thus those issues are properly before this Court. Title 28 U.S.C. 2254(b). In addition, petitioner alleges for the first time that the trial judge was not an "impartial arbiter" and, therefore, assisted the prosecution's case. This additional claim, never having been presented to the state courts, is not properly before this Court. *Picard v. Connor*, 404 U.S. 270, 275-76, 92 S.Ct. 509, 512 (1971); *United States ex rel. Hayden v. Zelker*, 506 F.2d 1228 (2d Cir. 1974); *United States ex rel. Daneff v. Henderson*, 501 F.2d 1180 (2d Cir. 1974).

I—FACTS

Petitioner and three other men were charged with felony murder and common law murder following a robbery during which one of the victims was shot and killed. Petitioner's three accomplices were apprehended as they attempted to flee from the scene of the crime. Petitioner was arrested approximately nine months later. One of the

accomplices entered a guilty plea to a lesser charge, and the remaining two were convicted of murder. Petitioner's first trial ended in a hung jury; the errors he now complains about occurred during his second trial.

II—FLIGHT CHARGE

Petitioner's first contention is that the trial court's charge on flight, coupled with the judge's analysis of the evidence that had been adduced during the trial, was so prejudicial as to deny petitioner a fair trial. Specifically, it argued that the instruction on flight[2] as evidencing a consciousness of guilt failed to comply with the applicable legal standards as set down by the New York Court of Appeals. The cases cited by petitioner do not support his contention that the judge's charge to the jury was in any manner deficient as a matter of law. On the contrary, the charge was a precise statement of every element required by the New York state courts when charging flight. See *People v. Baker*, 26 N.Y.2d 169, 174 (1971); *People v. Yazum*, 13 N.Y.2d 302, 304 (1964); *People v. Leyra*, 1 N.Y.2d 199, 209 (1956). Furthermore, it is argued that the judge, in commenting on the evidence while charging flight, erroneously stated to the jury that the witnesses in the superette where the robbery occurred had testified that two of the holdup men carried guns. A review of the record shows that the two eyewitnesses testified that three men participated in the robbery and murder, but that only one man was observed to be carrying a gun. However, the testimony of the police officers who chased and apprehended three or the robbers, was that petitioner and one other co-defendant were observed to be carrying guns. Assuming that the judge's misstatement of the facts was error, it was not of such magnitude as to deny petitioner a fair trial. It is a well established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall

charge. The judge instructed the jury in his opening remarks and again at the conclusion of his charge that,

> "Now, I'll caution you that what I said, it is not my recollection of the testimony of the witnesses, or the recollection of Mr. Lombardo [defense counsel] or the recollection of the District Attorney, it is your recollection which controls and only your recollection." (Record at 225).

Neither of petitioner's challenges to the charge are well taken. When the charge is viewed as a whole, the error, if any, did not rise to the level of a denial of due process. It is settled law that a jury charge in a state trial is normally a matter of state law and is not reviewable on federal habeas corpus unless the alleged errors are so serious as to deprive the petitioner of a federal constitutional right. *Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); *United States ex rel. Stanbridge v. Zelker*, 514 F.2d 45 (2d Cir. 1975); *United States ex rel. Smith v. Montanye*, 505 F.2d 1355 (2d Cir. 1974); *United States ex rel. Winfield v. Cascles*, 403 F.Supp. 956 (E.D.N.Y. 1975).

> "Before a federal court may overturn a state trial . . . , it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp v. Naughten, supra*, 414 U.S. at 146, 94 S.Ct. at 1359.

The rendering of the flight charge and the judge's accompanying remarks did not violate petitioner's constitutional rights.

III—USE OF PETITIONER'S STATEMENT

On March 11, 1971 approximately nine months after the robbery and murder, Police Detective Robert Marshall encountered petitioner at the 67th Precinct Police Station

where Rickenbacker was in custody for an unrelated offense. Before advising petitioner of his constitutional rights as mandated by the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), Marshall questioned petitioner and elicited from him his name and address (63 Decatur Street). During petitioner's trial, Marshall testified about his investigatory efforts regarding the robbery and killing. He testified that on the night of the crime he went to a rooming house at 63 Decatur Street seeking the petitioner, but that he searched the house without success. He further testified that at various times over the next nine months he kept that address under surveillance and also visited numerous other places and spoke with various people. Petitioner's admission was offered by the prosecution as proof of its contention that Rickenbacker had fled his usual haunts and, in so fleeing, displayed a guilty conscience. Defense counsel argued that petitioner's statement, although innocuous on its face, should have been suppressed for failure to comply with *Miranda*. The trial court allowed the statement to be introduced, ruling that it only concerned "pedigree" and, therefore, was not governed by the broad prophylactic rule laid down in *Miranda*.

Petitioner now argues that the admission of his statement, elicited without the benefit of *Miranda* warnings, violated his Fifth Amendment privilege against self-incrimination.

In *United States ex rel. Hines v. LaValle*, 521 F.2d 1109 (2d Cir. 1975), a similar argument was made by a state prisoner appealing the denial of his writ of habeas corpus. There, the defendant, while in custody and enroute to the police station, but before being advised of his rights, informed the police, "[I]n response to questions designed to pass the time by seeking background data (i.e., his name, address, age, marital status), that he had been married for 11 years and had 2 children." *Hines, supra*, at 1110.

During the robbery and rape, for which that defendant had been arrested, the assailant had told the victim that he had been married 11 years and had 2 children. The court, after a suppression hearing, admitted the victim's testimony and that of the arresting officer regarding the defendant's statement to each, respectively, that he had been married 11 years and had 2 children. The Circuit Court, although stating that a person's name, age, address, marital status and similar data, is usually non-incriminatory in character, acknowledged that it "[M]ay in a particular context provide the missing link required to convict." *Hines, supra,* at 1112. However, the court held that the introduction of the defendant's statement was not error because,

> "[T]he answer furnished by Hines to the arresting officer . . . constituted merely basic identification required for booking purposes, its admission was not barred because of the officer's failure to satisfy Miranda's warning-waiver procedure." *Hines, supra,* at 1113.

A fortiori, the introduction of the petitioner's statement in the case, *sub judice,* did not violate Rickenbacker-s Fifth Amendment privilege. See also *United States v. LaMonica,* 472 F.2d 580 (9th Cir. 1972); *Farley v. United States,* 381 F.2d 357 (5th Cir.), *cert. denied,* 389 U.S. 942 (1967).

IV—SIXTH AMENDMENT CLAIM

On the evening of the robbery-murder Detective Marshall questioned each of petitioner's co-defendants. As a result of information acquired from the interview, Marshall went to 63 Decatur Street in search of petitioner. At the trial Marshall testified that he spoke with each of the co-defendants and that he thereafter traveled to 63 Decatur Street. Petitioner argues that the Detective's testimony was a "subtle, indirect and inferential" use of a co-defendant's

statement without affording him an opportunity to cross-examine the declarant and, therefore, violated his right to confront witnesses against him as secured to him by the Sixth and Fourteenth Amendments. *Bruton v. United States,* 391 U.S. 123 (1968). *Bruton* held that the admission during a joint trial of a non-testifying defendant's extrajudicial statement which implicates a co-defendant, violates the co-defendant's right to confront witnesses against him. Here, petitioner was tried separately from his co-defendants; and, no statement made by a co-defendant was offered against him. There was no testimony that any co-defendant implicated petitioner or that they gave the address where petitioner could be found to the police. Therefore, the "substantial threats to the defendants constitutional rights," which the Supreme Court sought to prohibit by its decision in *Bruton* are not present in this case.

V—INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner's final contention is that the incompetence of his appointed counsel deprived him of his Sixth and Fourteenth Amendment rights to a fair trial. *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The burden of proof is of course on petitioner to sustain the allegations of his habeas corpus petition, including the specific claim here under consideration. However, before examining Rickenbacker's contention, it is appropriate to consider the standards by which these allegations must be weighed. This Circuit has established stringent standards to be applied when passing on the alleged inadequacy of counsel. *United States v. Yanishefsky,* 500 F.2d 1327, 1333 (2d Cir. 1974); *United States ex rel. Walker v. Henderson,* 492 F.2d 1311, 1312 (2d Cir.), *cert. denied,* 417 U.S. 972 (1974); *United States ex rel. Marcelin v. Mancusi,* 462 F.2d 36, 42 (2d Cir. 1972), *cert. denied,* 410 U.S. 917 (1973); *United States ex*

rel. Scott v. Mancusi, 429 F.2d 104, 109 (2d Cir. 1970), *cert. denied*, 402 U.S. 909 (1971); *United States v. Katz*, 425 F.2d 928, 930-31 (2d Cir. 1970); *United States v. Currier*, 405 F.2d 1039, 1042-43 (2d Cir.), *cert. denied*, 395 U.S. 914 (1969); *United States v. Garguilo*, 324 F.2d 795, 796-97 (2d Cir. 1963); *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950).

The showing required to establish inadequacy of counsel was enunciated by this Circuit in *United States v. Wight*, *supra*, 176 F.2d at 379:

> ". . . The proof of the efficiency of such assistance lies in the character of the resultant proceedings, and unless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus . . . (citations omitted).
>
> "A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court. . . ." (citations omitted).

That standard, articulated in 1949, has been followed consistently by this Circuit in determining the adequacy of counsel's representation. Most recently, this standard has been characterized as requiring that the representation be so "[W]oefully inadequate 'as to shock the conscience of the Court. . . .' " before a finding of ineffective assistance will be made. *United States v. Yanishefsky*, *supra*, 500 F.2d at 1333, quoting *United States v. Currier*, *supra*, 405 F.2d at 1043, which in turn quoted from *United States v. Wight*, *supra*, at 379. However, "Errorless counsel is not required. . . ." *Yanishefsky*, *supra*, at 1333, and "[B]efore we may vacate a conviction there must be a 'total failure to present the cause of the accused in any fundamental respect." *United States v. Garguilo*, *supra*, 324 F.2d at

796, quoting *Brubaker v. Dickson*, 310 F.2d 30, 39 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963).

The Court has carefully examined all of Rickenbacker's allegations with respect to his attorney's performance. In doing so, the Court has come to the conclusion that petitioner's attorney did not fail to "present the cause of the accused," or, perform so "ineptly" as to give rise to a valid claim of inadequate assistance under the strict standard laid down in *Wight*, *supra*.

Applying these standards to this case, petitioner's claim, viewed in the light most favorable to him, may be summarized as follows: The prosecution's case was not an overwhelming one and, at petitioner's earlier trial, the jury had been unable to reach a verdict. Defense counsel knew what to expect from the People's witnesses because they had testified at the earlier trial. In light of these facts, petitioner cites four areas where he claims his counsel's performance is suspect: (1) his cross-examination of the police officers who identified petitioner was "brief and perfunctory"; (2) counsel failed to challenge the police officers' facility to identify petitioner in view of the nine month lapse of time between the crime and petitioner's apprehension; (3) there was no objection to the receipt in evidence of the gun petitioner supposedly discarded during the chase; and, (4) the failure to challenge the prosecution's offer of proof of flight. The combination of these errors, it is argued, amounted to a total failure by counsel to adequately represent petitioner.

As is pointed out in the respondent's brief, the flaw in petitioner's claim is that, in essence, he simply differs with defense counsel's strategy. Whether to have cross-examined the police more extensively was a judgment to be made by counsel based upon the facts known to him. Here, counsel had access to the officers' testimony at the earlier trial as well as at the *Wade* hearing which preceded it. As has been pointed out many times before, the advisability of

extensive cross-examination is a matter open to honest differences of opinion. Even if we assume that it was error for counsel to have failed to cross-examine more extensively, it did not result in a failure to put before the jury the inherent unreliability of eye-witness identification. Counsel devoted much of his summation to this issue as well as to the lapse of time between the crime and petitioner's arrest. It has been consistently held that a court may not grant relief for "[A]lleged tactical errors or mistakes in strategy . . . ." *Garguilo, supra,* 324 F.2d at 797.

In regard to petitioner's allegation that his counsel failed to object to the introduction in evidence of the gun which he had been observed to be carrying, it is doubtful that any objection made by counsel would have succeeded. Both police officers testified that they saw the gun in petitioner's hand, and Officer Thomas Walsh stated that when petitioner was only 30 or 40 feet from him Rickenbacker threw the gun between two parked cars. Walsh also testified that after losing sight of petitioner he returned immediately to the spot where he had seen petitioner discard the gun and found a gun lying between two cars. Further, each officer identified Officer Scannapieco's initials that had been scratched on the gun when it was initially recovered. Again, experienced counsel may well have determined that an objection would have been futile.

Finally, petitioner maintains that when the prosecution failed to introduce petitioner's relatives and friends to testify on the issue of flight, counsel failed to move to strike the statements by the prosecution in its opening which had promised such evidence. The Court can find no basis in the record to support such an allegation. The fact is, defense counsel objected to the whole line of questioning of Detective Robert Marshall regarding flight and moved to strike all of the detective's testimony on the ground that a proper foundation had not been laid.

Having studied the record, the Court can find no basis for petitioner's allegation of ineffective assistance of counsel.

Parenthetically it might be added that petitioner's attorney, Joseph Lombardo, Esq., has appeared before this Court on numerous occasions and it is familiar with his skill. Furthermore, the Court is aware of his high reputation as a criminal defense attorney and the fact that he is a former President of the Brooklyn Bar Association. In the present case, Mr. Justice Michael Kern, who presided at petitioner's trial, in commenting on the case after the jury had been discharged, stated:

> "[I]t was really a pleasure to preside at a trial because we have such able lawyers."

This Court finds nothing to support the contention that Mr. Justice Kern erred in his appraisal of Mr. Lombardo's performance. The fact that petitioner was represented at his trial in a manner differently from what petitioner's present attorney would have done is not a basis for setting aside the judgment of conviction. This case is a long way from approaching the standard for ineffective assistance of counsel set forth above.

CONCLUSION

Accordingly it is

ORDERED that the petition be dismissed and the writ of habeas corpus denied.

SO ORDERED.

s/ Thomas C. Platt
U.S.D.J.

FOOTNOTES

1. At the time this petition was filed, petitioner was incarcerated in the Auburn Correctional Facility, Auburn, New York.

2. The court charged as follows:

"Now, I said to you that I would charge you as to what the District Attorney calls 'flight of the defendant.' Madam and gentlemen, the conduct of an accused such as flight or attempted flight is always a proper subject for the consideration of a jury as indicative of a guilty mind and in determining the question of the guilt or innocence of the person charged. Such evidence may be considered under the law if there are facts pointing to the commission of the crime charged as to the motive which prompted such flight. Such evidence is admissible on the theory that an inference of guilt may be drawn from acts which indicate a consciousness of guilt. The District Attorney maintains that this defendant fled, as I have already told you and I have outlined his contention with respect to efforts to arrest the defendant.

"Such evidence, members of the jury, standing alone and with nothing else, is insufficient to warrant a verdict of guilty. It must be supported by other proof of the defendant's involvement in the alleged robbery and killing of a substantial character. Here the District Attorney maintains that the other proof lies in the testimony which he has submitted of witnesses who were in the store and who described the three men to the extent that they said two of them had guns. The District Attorney maintains that such other proof lies in the testimony of police officer Walsh, that is, he saw the defendant, gun in hand, with another man, gun in hand, and a third man running along; that when they gave chase, one of them got into a car and was apprehended, and as I said, the other two, including this defendant, during the course of such chase, threw the gun which he held in his hand underneath an automobile or between two parked automobiles.

"And so, you see, madam and gentlemen of the jury, it is the District Attorney's contention that by reasoning from the established facts in the case, without recounting, without going over those established facts, which, incidentally, the defendant says or claims are not established facts beyond a reasonable doubt, but drawing inferences from those established facts, the conclusion is irresistible, says the District Attorney. The conclusion flows freely and smoothly and logically to the ultimate conclusion that this defendant was one of the three men in the store at the time of the perpetration of the robbery, and at the time of the shooting of Vito Petrancosta, and that those

circumstances, reasoning from such established facts, claims the District Attorney, exclude to a moral certainty every other hypothesis, save that of the guilt of this defendant. Such is the contention of the prosecution.

"The defendant, by his plea of not guilty in this case, denies in toto the contention or the contentions of the District Attorney." (Record at 217-219).

APPENDIX "C"
ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING RE-ARGUMENT EN BANC

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of April, one thousand nine hundred and seventy-seven.

Docket No. 76-2036

ROBERT RICKENBACKER,

Appellant,

-v.-

THE WARDEN, AUBURN CORRECTIONAL FACILITY AND THE PEOPLE OF THE STATE OF NEW YORK,

Appellees.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN,
Chief Judge